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UNITED STATES OF AMERICA

13 UNITED STATES DISTRICT COURT  
14  
15 FOR THE CENTRAL DISTRICT OF CALIFORNIA

16 UNITED STATES OF AMERICA, ) No. CR 11-00930(B)- TJH  
17 Plaintiff, ) GOVERNMENT'S TRIAL MEMORANDUM  
18 v. )  
19 DAVID KALAI, and ) Trial Date: December 9, 2014  
NADAV KALAI, ) Time: 10:00 a.m.  
20 )  
21 Defendants. )  
\_\_\_\_\_ )

22 Plaintiff United States of America, by and through its  
23 counsel of record, the United States Attorney for the Central  
24 District of California and the Tax Division of the United States  
25 Department of Justice, hereby submits its trial memorandum for  
26 the above-captioned case.

1   **I.   CASE STATUS**

2           A.   Trial is scheduled to begin on December 9, 2014, before  
3 the Honorable Terry J. Hatter, Jr., United States District Judge.

4           B.   The government's case-in-chief is estimated to be five  
5 days in length.

6           C.   The Second Superseding Indictment charges DAVID KALAI  
7 ("D. KALAI") and NADAV KALAI ("N. KALAI") with conspiring to  
8 defraud the United States in violation of 18 U.S.C. §371. D.  
9 KALAI is also charged in Counts Two and Three with Willfull  
10 Failure to File a Report of Foreign Bank and Financial Accounts  
11 ("FBAR") for calendar years 2008 and 2009, in violation of 31  
12 U.S.C. §§ 5314, 5322(a). N. KALAI is charged in Counts Four and  
13 Five with the same crime for calendar years 2008 and 2009. The  
14 government expects to call approximately 16 witnesses in its  
15 case-in chief.<sup>1</sup> Neither party will call an expert witness.

16          D.   Defendants D. KALAI and N. KALAI are each on bond  
17 pending trial. Defendant DAVID ALMOG never appeared in the case  
18 and is a fugitive.

19          E.   Trial by jury has not been waived.

20          F.   An interpreter is not needed.

21          G.   Stipulations Agreed To In Parties Joint Brief Regarding  
22 Motions In Limine (Docket Entry No. 184)

- 23                   1.       During its case-in-chief, the government  
24                           intends to offer into evidence e-mails  
25                           authored by David Kalai. Counsel for David

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26           <sup>1</sup>In denying defendants D. KALAI and N. KALAI's Motion For  
27 Order Authorizing Foreign Deposition of Dan Meiri, the Court  
28 ruled that, in light of the government's unequivocal statements  
that it does not intend to call Robert Sandlin as a witness, the  
government is precluded from calling Robert Sandlin as a witness  
in its case-in-chief. Robert Sandlin will not be called as a  
witness by the government in its case-in-chief.

1 Kalai has advised the government that he will  
2 not object to the introduction of these  
3 emails into evidence on the basis that there  
is a lack of foundation that they are, in  
fact, statements of David Kalai.

4 2. The government agreed that it would not  
5 elicit in its case-in-chief testimony that  
6 defendant N. KALAI stole approximately  
\$642,000 from Alexei Iazlovsky as set forth  
7 in the government's Notice of Intent to  
Introduce Inextricably Intertwined Evidence  
or, Alternatively, Evidence Pursuant to Fed.  
8 R. Evid. 404(b).

9 3. The parties intend to enter into a  
10 stipulation that bank records from Wells  
11 Fargo Bank, Bank Leumi USA, Bank Leumi  
12 Luxembourg and Bank Leumi Israel may be  
13 admitted into evidence without the necessity  
of establishing a foundation of authenticity  
14 or identification, and that those documents  
15 constitute the records of regularly conducted  
activities of the business referred to and  
16 are therefore admissible into evidence as  
exceptions to the hearsay rule under  
provisions of Federal Rule of Evidence  
803(6). The defendants have advised the  
government that they reserve objections on  
all other grounds, such as relevance and  
hearsay within such business records.

17 H. Redaction of Trial Exhibits

18 Pursuant to Federal Rule of Criminal Procedure 49.1, on the  
19 first day of trial, subject to guidance from the Court, the  
20 government intends to take the following steps to protect  
21 personal information of third parties contained in the  
22 government's trial exhibits:

- 23 1. The government will provide the Court and  
24 defense counsel with a redacted set of the  
25 government's trial exhibits.
- 26 2. The government will have available in the  
27 courtroom two unredacted sets of the  
government's trial exhibits in the unlikely  
event the witness needs to review an  
unredacted copy of an exhibit.
- 28 3. The original trial exhibits will contain

1 redacted documents. The jury will never have  
2 access to the protected personal information  
3 contained in the government's trial exhibits.

4 I. Pretrial Motions

5 There was significant motions practice prior to the transfer  
6 of this case. The government has summarized the Court's  
7 evidentiary rulings in Section IV.

8 **II. THE INDICTMENT**

9 On October 17, 2013, a federal grand jury in the Central  
10 District of California returned a Second Superseding Indictment  
11 charging D. KALAI and N. KALAI with one count of conspiracy to  
12 defraud the United States, in violation of 18 U.S.C. § 371. The  
13 Second Superseding Indictment alleges that defendants D. KALAI  
14 and N. KALAI, among others, conspired to defraud the United  
15 States for the purpose of impeding, impairing, obstructing, and  
16 defeating the lawful government functions of the Internal Revenue  
17 Service, in the ascertainment, computation, assessment, and  
18 collection of income taxes. Second Superseding Indictment at ¶  
19 21.

20 From at least April, 2000 until in or about 2010, as  
21 officers and/or tax preparers of United Revenue Service, Inc.  
22 ("URS"), defendants D. KALAI, N. KALAI, and DAVID ALMOG, along  
23 with un-indicted co-conspirator Robert Sandlin took steps to help  
24 their URS clients form offshore shell corporations and then  
25 advised the clients to establish undeclared bank accounts, using  
26 the shell corporations as named account holders, at Bank Leumi  
27 (Luxembourg) S.A. ("Bank Leumi, Luxembourg") and Bank Hapoalim  
28 (Suisse) S.A. in Luxembourg ("Bank Hapoalim, Luxembourg"). The  
co-conspirators prepared false corporate and partnership tax

1 returns on behalf of their clients, which falsely reported money  
2 sent to the undeclared bank accounts as investment losses and/or  
3 business expenses. The co-conspirators prepared false individual  
4 income tax returns that underreported the clients' true income  
5 and failed to disclose the existence of the clients' undeclared  
6 bank accounts at Bank Leumi and Bank Hapoalim in Luxembourg. In  
7 order to ensure that the accounts remained concealed from the  
8 IRS, the co-conspirators caused their clients to fail to file  
9 FBARs

10 Counts Two and Three charge defendant D. KALAI with  
11 willful failure to file an FBAR in violation of 31 U.S.C. §§ 5314  
12 and 5322(a) concerning an account held at Bank Leumi, Luxembourg  
13 in the name of Anack Ltd. Defendant N. KALAI is also charged in  
14 Counts Four and Five with willful failure to file an FBAR, in  
15 violation of 31 U.S.C. §§ 5314 and 5322(a), concerning his  
16 financial interest in the Anack Ltd. account.

17 **III. STATEMENT OF FACTS**

18 A. United Revenue Service Inc.

19 D. KALAI, and his son N. KALAI, operated a tax return  
20 preparation business called United Revenue Service, Inc. ("URS")  
21 with offices across the United States. URS had locations in Los  
22 Angeles, California; Santa Clara, California; San Diego,  
23 California; Seattle, Washington; Dallas, Texas; St. Louis,  
24 Missouri; Chicago, Illinois; Boston, Massachusetts; New York, New  
25 York; and Atlanta, Georgia. At various times between 2000 and  
26 2010, URS had its headquarters in Newport Beach, California;  
27 Costa Mesa, California; and Bethesda, Maryland.

1           B.     The Defendants And Their Co-Conspirators

2           Defendant D. KALAI established URS in or about 1988 and  
3 also worked at URS as a tax return preparer. D. KALAI prepared  
4 and filed tax returns for high-net worth clients until at least  
5 2008. Defendant D. KALAI worked primarily at URS headquarters in  
6 Newport Beach, California, and later, at URS's location in Costa  
7 Mesa, California. Defendant N. KALAI worked for URS as a tax  
8 return preparer from 2001 until the business closed in 2011.  
9 Defendant N. KALAI worked primarily at URS's headquarters in  
10 Bethesda, Maryland, but would travel to the URS locations in  
11 Newport Beach, California, and Costa Mesa, California during tax  
12 season to prepare returns. Defendants D. KALAI and N. KALAI were  
13 Israeli citizens who subsequently became naturalized citizens of  
14 the United States in 1994.

15           ALMOG was a tax return preparer employed by URS in its New  
16 York office. ALMOG began working for URS in or about 2001. In  
17 2006, defendant ALMOG was the branch manager of URS's New York  
18 office and a supervisor of tax return preparers at URS's East  
19 Coast locations. Unindicted co-conspirator Robert Sandlin was a  
20 URS tax return preparer from 2000 until early 2006. Robert  
21 Sandlin worked out of the Newport Beach, California URS  
22 headquarters, located in the Central District of California.

23           C.     The Scheme

24           D. KALAI and N. KALAI along with Robert Sandlin and ALMOG  
25 implemented a scheme to fraudulently reduce taxes for URS' high-  
26 net-worth clients through the use of offshore bank accounts and  
27 offshore nominee entities that were named as the bank account  
28 holder. The scheme involved three steps: First, the co-

1 conspirators would establish an offshore corporation in Belize or  
2 the British Virgin Islands for the client. Second, the co-  
3 conspirators would assist the client with opening an offshore  
4 bank account in the name of the offshore corporation to conceal  
5 its existence from U.S. taxing authorities. Third, the co-  
6 conspirators would prepare and file false individual and  
7 corporate tax returns that claimed false expenses, omitted income  
8 or claimed fabricated investment losses.

9 1. Creating the Offshore Corporation

10 In most instances, the clients relied on URS to assist  
11 them with establishing the offshore corporation. Other times,  
12 the foreign bank would perform this service for the client.  
13 Specifically, URS used the services of WestGlobe, Inc.  
14 ("WestGlobe") to set-up the offshore corporations in Belize. One  
15 URS employee, a tax administrator, would help the clients  
16 complete the paperwork, courier the paperwork to WestGlobe, and  
17 invoice the clients for Westglobe's services. She kept a list of  
18 offshore corporations opened upon the recommendation of URS; the  
19 list is eight pages long and identifies eighty-nine offshore  
20 corporations. Each of the clients the government intends to call  
21 at trial is identified on this offshore corporation list.

22 2. Opening the Foreign Bank Account

23 The foreign bank accounts were opened at either Bank  
24 Leumi, Luxembourg or Bank Hapoalim, Luxembourg with the  
25 assistance of the co-conspirators. But for an introduction from  
26 D. KALAI, or another tax prepare at URS, these clients would not  
27 have been able to open a foreign account. Indeed, in late 2002,  
28 and again in 2004, D. KALAI attempted to negotiate a referral

1 contract with Bank Leumi, Luxembourg. As part of the contract,  
2 D. KALAI sought to be compensated for the clients he referred to  
3 Bank Leumi, Luxembourg. Although the contract was not executed,  
4 Bank Leumi's records indicate that D. KALAI was a referral agent  
5 of the bank and was assigned a service code that tracked the  
6 deposits associated with customers he, and others at URS,  
7 referred to Bank Leumi, Luxembourg. A bank account would be  
8 opened in the name of the offshore corporation in order to  
9 conceal the account from the IRS. Neither Bank Leumi nor Bank  
10 Hapoalim would report the existence of the account to the IRS.

### 11 3. Preparing and Filing False Tax Returns

12 D. KALAI, N. KALAI and the other co-conspirators would  
13 then prepare and file tax returns that falsely reduced the  
14 client's taxable income. Depending upon the client's situation  
15 and circumstances, the co-conspirators prepared false returns  
16 that fell into three basic categories. The co-conspirators  
17 would offset high net-worth clients' reported income by claiming  
18 false flow through losses from a partnership or subchapter S  
19 corporation. The transfers offshore would be characterized as  
20 "Outside Services" or "Information Acquisition Costs," in order  
21 to falsely reduce the client's taxable income.

22 When a client earned income from a foreign sources - such  
23 as sales to overseas vendors or the sale of a corporation located  
24 in Israel, the income was simply omitted from the client's tax  
25 returns. The income diverted to the foreign bank account was  
26 left off the tax return and no U.S. income tax was paid  
27 concerning that income.

28 The third variation of the scheme concerned creating false



1 losses to reduce taxable income. D. KALAI, N. KALAI, Sandlin, or  
2 ALMOG determined or estimated what the client's legitimate  
3 potential tax liability would be for a particular year during tax  
4 planning sessions. The co-conspirators then offered to create a  
5 loss for clients by transferring money from the client to one of  
6 three business accounts controlled by the Sandlin at Wells Fargo  
7 Bank in the names of Platinum Planning Group, Global Securities,  
8 and Transnet Asset Management. After receiving the client's  
9 money, Sandlin subsequently transferred the money from the Wells  
10 Fargo bank accounts into the foreign account held in the name of  
11 the offshore corporation. On paper, it appeared as though the  
12 client had "lost" money in a bad investment through Platinum  
13 Planning Group. In reality, the funds were safe in the foreign  
14 bank accounts and the URS clients had total control over those  
15 funds. False losses were then claimed on the URS client's  
16 federal income tax returns. In turn, the false loss flowed  
17 through to the clients' individual tax return falsely reducing  
18 their taxable income.

19 The seven clients set to testify in this case shuffled  
20 over \$20 million offshore to evade the payment of approximately  
21 \$7 million in taxes.

#### 22 **IV. ELEMENTS OF CHARGED OFFENSES**

##### 23 **A. Conspiracy to Defraud the United States**

24 Count One of the Second Superseding Indictment charges  
25 that defendants conspired together, and with others, to defraud  
26 the United States for the purpose of impeding, impairing,  
27 obstructing, and defeating the lawful governmental functions of  
28 the IRS in the ascertainment, computation, assessment, and

1 collection of taxes. This type of conspiracy is commonly  
2 referred to as a Klein conspiracy. United States v. Klein, 247  
3 F.2d 908 (2d Cir. 1957).

4 In order to prove the crime of conspiracy to defraud the  
5 United States charged in Count One, the government must prove  
6 three elements. First, there was an agreement between two or  
7 more persons to defraud the United States by impeding, impairing,  
8 obstructing, or defeating the lawful functions of the Internal  
9 Revenue Service by deceitful or dishonest means. Second, the  
10 defendant became a member of the conspiracy knowing of its object  
11 and intending to help accomplish it. And third, one of the  
12 members of the conspiracy performed at least one overt act for  
13 the purpose of carrying out the conspiracy. United States v.  
14 Meredith, 685 F.3d 813, 923 (9th Cir. 2012; United States v.  
15 Caldwell, 989 F.2d 1056, 1059 (9th Cir.1993).

16 B. Willful Failure to File FBARs

17 In order to prove the crime of willful failure to file  
18 reports of foreign bank and financial accounts charged in Counts  
19 Two through Five, the government must prove: (1) the defendant  
20 was a resident or citizen of the United States or a person in,  
21 and doing business in, the United States during the charged  
22 calendar year; (2) the defendant had a financial interest in, or  
23 signature or other authority over, a bank, securities, or other  
24 financial account in a foreign country during the calendar year  
25 specified in the count; (3) the aggregate value of the foreign  
26 financial account exceeded \$10,000 during the calendar year; and  
27 (4) the defendant willfully failed to file a report of foreign  
28 bank and financial accounts on or before June 30 of the year

1 following the calendar year specified. 31 U.S.C. §§ 5314,  
2 5322(a); 31 C.F.R. §§ 103.24 (filing requirement), 103.27 (June  
3 30 filing deadline, value exceeding \$10,000); Report of Foreign  
4 Bank and Financial Account, Form TD F 90-22.1 (October 2008 rev.)

5 1. Foreign Country

6 The term "foreign country" includes all geographical areas  
7 located outside the United States. The geographical location of  
8 the account, not the nationality of the financial entity  
9 institution in which the account is found determines whether it  
10 is an account in a foreign country. Report of Foreign Bank and  
11 Financial Account, Form TD F 90-22.1 (October 2008 rev.), General  
12 Instructions (containing definitions); United States v. Kerr,  
13 2013 WL 4430917 at \*7 (D. Ariz.) (unpublished) (holding that  
14 definitions set forth in the Form TD F 90-22.1 are based upon the  
15 federal regulations and are an appropriate source for jury  
16 instructions).

17 2. Financial Interest

18 A United States person has a financial interest in each  
19 account for which such person is the owner of record or has legal  
20 title, whether the account is maintained for his or her own  
21 benefit or for the benefit of others including non-United States  
22 persons. Report of Foreign Bank and Financial Account, Form TD F  
23 90-22.1 (October 2008 rev.), General Instructions (containing  
24 definitions); United States v. Kerr, 2013 WL 4430917 at \*7 (D.  
25 Ariz.) (unpublished) (holding that definitions set forth in the  
26 Form TD F 90-22.1 are based upon the federal regulations and are  
27 an appropriate source for jury instructions)

1                   3.       Signature Authority

2           A person has "signature authority" over an account if such  
3 person can control the disposition of money or other property in  
4 it by delivery of a document containing his signature to the bank  
5 or other person with whom the account is maintained. Report of  
6 Foreign Bank and Financial Account, Form TD F 90-22.1 (October  
7 2008 rev.), General Instructions (containing definitions); United  
8 States v. Kerr, 2013 WL 4430917 at \*7 (D. Ariz.) (unpublished)  
9 (holding that definitions set forth in the Form TD F 90-22.1 are  
10 based upon the federal regulations and are an appropriate source  
11 for jury instructions)

12                   4.       Other Authority

13           "Other authority" exists in a person who can exercise  
14 comparable power over an account by communication to the bank or  
15 other person with whom the account is maintained, either directly  
16 or through an agent, nominee, attorney, or in some other capacity  
17 on behalf of the U.S. person, either orally or by some other  
18 means. Report of Foreign Bank and Financial Account, Form TD F  
19 90-22.1 (October 2008 rev.), General Instructions (containing  
20 definitions); United States v. Kerr, 2013 WL 4430917 at \*7 (D.  
21 Ariz.) (unpublished) (holding that definitions set forth in the  
22 Form TD F 90-22.1 are based upon the federal regulations and are  
23 an appropriate source for jury instructions)

24                   5.       Willfully

25           In order to prove that the defendant "willfully" failed to  
26 file an FBAR, the government must prove beyond a reasonable doubt  
27 that each defendant knew federal law imposed a duty on him to  
28 file an FBAR", and that each defendant intentionally and

1 voluntarily violated that duty. Cheek v. United States, 498 U.S.  
 2 192, 201 (1991) ("Willfulness, as construed by our prior  
 3 decisions in criminal tax cases, requires the Government to prove  
 4 that the law imposed a duty on the defendant, that the defendant  
 5 knew of this duty, and that he voluntarily and intentionally  
 6 violated that duty."); United States v. Sturman, 591 F.2d 1466,  
 7 1476 (6th Cir. 1991) (willfulness applies to FBAR violations);  
 8 see also United States v. Meredith, 685 F.3d 814, 826 (9th Cir.  
 9 2012) ("Any voluntary act committed with the specific intent to  
 10 disobey or disregard the law qualifies as willfulness")

#### 11 **V. LEGAL AND EVIDENTIARY ISSUES**

12 A. The Court's Order on the Motions in Limine

13 On July 22, 2013, the parties filed a Joint Brief  
 14 Regarding Motions In Limine concerning certain evidentiary  
 15 issues. The government filed one motion to admit certain  
 16 customer profile documents. Defendants D. KALAI and N. KALAI  
 17 filed two motions in limine and a separate motion to preclude the  
 18 introduction of evidence outlined in the Government's Notice of  
 19 Intent to Introduce Inextricably Intertwined Evidence or,  
 20 Alternatively, Evidence Pursuant to Federal Rule of Evidence  
 21 404(b). (Docket Entry No. 177.)

22 After the pretrial conference, the Court issued a written  
 23 order resolving the pre-trial motions. The Court's Order is  
 24 attached hereto as Exhibit A and summarized in the following  
 25 bullet points:

- 26 1. The "referral information" in the Customer  
 27 Profiles is not admissible without additional  
 28 foundation evidence. In order to be  
 admissible under the business records  
 exception to the hearsay rule, the Bank Leumi  
 records foundational witness must provide a

1 sufficient showing of the existence of a  
2 verification policy or procedures concerning  
the "referral information."

3 2. The Bank Hapoalim Know Your Customer  
4 Statement concerning witness M.N. is not  
admissible at trial.

5 3. The 1999 felony drug possession of co-  
6 conspirator Robert Sandlin is not admissible  
at trial.

7 4. The 2011 wire fraud conviction of co-  
8 conspirator Robert Sandlin is admissible to  
9 the extent defendants seek to introduce the  
conviction itself and facts related to  
Sandlin's misappropriation of funds from  
witness M.W.

10 5. Defendant D. KALAI is not permitted to  
11 impeach the credibility of Robert Sandlin by  
12 introducing: (a) Sandlin's Enrolled Agent  
13 Application; or (b) testimony from an IRS  
14 Official that the application was filed under  
15 penalties of perjury because the proffered  
evidence is extrinsic evidence to prove a  
specific instance of dishonesty, and  
therefore, prohibited by Fed. R. Evid.  
608(b).

16 6. Defendant D. KALAI is not permitted to  
17 impeach the credibility of Robert Sandlin by  
18 introducing the following statements that he  
19 made to federal law enforcement agents: (a)  
20 he continued to prepare false tax returns  
21 after he left URS; or (b) his admission that  
22 he was not truthful in a prior interview with  
law enforcement. The proffered evidence is  
"classic hearsay evidence." Because Robert  
Sandlin appears to be available as a witness,  
the evidence is not admissible under Fed. R.  
Evid. 807.

23 7. Evidence that Defendants D. KALAI and N.KALAI  
24 had ownership of and authority over  
undeclared foreign accounts is highly  
25 probative of (i) defendants intent to engage  
26 in the charged conspiracy; and (ii) the  
absence of mistake or miscommunication about  
whether the clients' accounts must be  
disclosed, and therefore, is admissible under

Federal Rule of Evidence 404(b)<sup>2</sup>.

8. Evidence of other false items on the tax returns of the clients in the First Superseding Indictment, such as "false amortization expenses" are inextricably intertwined with the charged conspiracy, and therefore, admissible at trial.

- B. The Court's Order on the Defendant D. KALAI's Motion to Sever/Defendant N. KALAI's Motion To Exclude Evidence (Docket No.174)

The Court made two additional evidentiary rulings in connection with defendant D. KALAI's Motion to Sever and defendant N. KALAI's Motion to Exclude Evidence.

1. The evidence of destruction of documents is admissible against defendant N. KALAI.
2. Evidence of document destruction by co-conspirator D. ALMOG is not admissible in the trial of D. KALAI and N. KALAI.

The Court's Order is attached hereto as Exhibit B.

- C. Evidence and Argument Concerning D. KALAI's Mental Or Physical Health Are Not Proper at Trial

Defendant D. KALAI appears to argue that issues such as defendant's age, health and family circumstances are proper for juror's to consider in this case. See Objections to Government's Proposed Voir Dire at 3. Defendant further argues that defendant's "ability to perceive facts or recall information" may somehow be relevant to the jury's deliberations. These issues were litigated as part of the competency proceedings before the Court and have no relevance to the jury's determination of

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<sup>2</sup>Subsequent to this ruling, a second superseding indictment charging both D. KALAI and N. KALAI with Willful Failure to File FBARs for calendar years 2008 and 2009 was returned by the grand jury. Therefore, this evidence is no longer subject to Rule 404(b). The evidence is direct evidence of the conduct charged in Counts Two through Five.

1 defendant's mental state at the time of the offense. Accordingly,  
2 such evidence and argument is not relevant and should not be  
3 presented to the jury at trial.

4 D. Agency Statements

5 A statement is not hearsay if the statement is offered  
6 against a party and is a statement by the party's agent  
7 concerning a matter within the scope of the agency or employment  
8 made during the existence of the relationship. Fed. R. Evid.  
9 801(d)(2)(D). The existence of an agency relationship is a  
10 question for the judge under Rule 104(a) and must be proved by  
11 substantial evidence. Hilao v. Estate of Marcos, 103 F.3d 767,  
12 775 (9th Cir. 1996).

13 The fact of an agency can be proved by the alleged agent's  
14 extrajudicial statements. That is, the Court may consider an out  
15 of court statement in making its Rule 104(a) determination of the  
16 admissibility of a statement under Rule 801(d)(2)(D). Hilao, 109  
17 F.3d at 775. Here, the government intends to introduce  
18 statements (in the form of email correspondence and letters) made  
19 by URS employees on behalf of defendant D. KALAI.

20 Specifically, in the process of negotiating a referral  
21 agreement with Bank Leumi, Luxembourg, two URS employees  
22 corresponded on behalf of D. KALAI in the course of their duties  
23 as employees of URS. In the first piece of correspondence,  
24 defendant D. KALAI advised a Bank Leumi, Luxembourg banker that  
25 he wanted to refer two URS clients to the bank and sought a one-  
26 time referral fee of 1% of the deposits. This e-mail  
27 correspondence is on the URS email system and was sent by the  
28 Corporate Administrative Manager of URS. Similarly, in a second



1 letter, written on URS letterhead, defendant D. KALAI proposed  
2 terms to be added and deleted to a referral agreement with Bank  
3 Leumi, Luxembourg. These statements were made by another URS  
4 employee and provide URS emails and phone numbers to engage in  
5 future contacts, These statements are admissible because they  
6 are statements by a party's agent.

7 E. Co-Conspirator Statements

8 Under Fed. R. Evid. 801(d)(2)(E), a statement is not  
9 hearsay if it is "a statement made by a co-conspirator of a party  
10 during the course or in furtherance of the conspiracy." For Rule  
11 801(d)(2)(E) to apply it is not necessary that the declarant be  
12 charged with the crime of conspiracy; any "concert of action  
13 creates a conspiracy for purposes of the evidence rule." United  
14 States v. Portac, Inc., 869 F.2d 1288, 1294 (9<sup>th</sup> Cir. 1989).

15 For a statement to be admissible under Rule 801(d)(2)(E),  
16 the offering party must establish that: (1) the statement was in  
17 furtherance of the conspiracy or scheme; (2) it was made during  
18 the life of the conspiracy or scheme; (3) the defendant and  
19 declarant were members of the conspiracy or scheme. See  
20 Bourjaily v. United States, 483 U.S. 171, 175 (1987). It is not  
21 necessary that the defendant have been present at the time the  
22 statement was made. Sandejas v. United States, 438 F.2d 1040,  
23 1045 (9th Cir. 1970). The declaration itself, together with  
24 independent evidence, may constitute sufficient proof of the  
25 existence of the conspiracy and the involvement of defendant and  
26 the declarant in it. Bourjaily, 483 U.S. at 181.

27 The district court may admit statements under Rule  
28 801(d)(2)(E) provided that it does not abuse its discretion.

1 United v. Bowman, 215 F.3d 951, 960-61 (9th Cir. 2000). The  
2 district court may find that statements were made in furtherance  
3 of the conspiracy provided that its factual findings are not  
4 clearly erroneous. Id.

5 F. Instructions

6 Instructions, directives and questions are not hearsay  
7 because such statements are not offered for the truth of the  
8 matters asserted. Such communications contain no declaration of  
9 fact capable of being proven true or false. United States v.  
10 Chung, 659 F.3d 815, 833(9th Cir. 2011); United States v. Reilly,  
11 33 F.3d 1396, 1410 (3d Cir.1994) ("Instructions to an individual  
12 to do something are ... not hearsay ... because they are not  
13 declarations of fact and therefore are not capable of being true  
14 or false.").

15 G. Business Records

16 The government will seek to admit evidence as business  
17 records of Bank Leumi, Luxembourg through a custodian of records.  
18 Business records are not normally self-proving. For the records  
19 to be admissible, the following foundational facts must be  
20 established through the custodian of the records or another  
21 qualified witness: (1) the records must have been made or  
22 transmitted by a person with knowledge at or near the time of the  
23 incident recorded; and (2) the record must have been kept in the  
24 course of regularly conducted business activity. United States  
25 v. Ray, 930 F.2d 1368, 1370 (9th Cir. 1990), as amended on denial  
26 of rehearing (9th Cir. 1991); Kennedy v. Los Angeles Police  
27 Dept., 901 F.2d 702, 717 (9th Cir.1990). "The phrase 'other  
28 qualified witness' is broadly interpreted to require only that  
the witness understand the record-keeping system." Id. United

1 States v. Franco, 874 F.2d 1136, 1139-40 (7th Cir.1989); United  
 2 States v. Hathaway, 798 F.2d 902, 906 (6th Cir.1986).

3       There is no requirement that the government establish when  
 4 and by whom the documents were prepared. United States v. Huber,  
 5 772 F.2d 585, 591 (9th Cir. 1985) ("there is no requirement that  
 6 the government show precisely when the [record] was compiled");  
 7 United States v. Basey, 613 F.2d 198, 201 n. 1 (9th Cir.1979)  
 8 (college records properly admitted to establish defendant's  
 9 address even though the custodian did not herself record the  
 10 information and did not know who did), cert. denied, 446 U.S. 919  
 11 (1980). "All that the rule requires is that the document be made  
 12 'at or near the time' of the act or event it purports to record."  
 13 Huber, 772 F.2d at 591.

14 **VI. CONCLUSION**

15       The government requests leave to file such additional  
 16 memoranda as may become appropriate during the course of the  
 17 trial.

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Respectfully submitted,

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